Supreme Court, U.S.
FILED
JUL 31 2007
OFFICE OF THE CLERK

No. 07-123

In the Supreme Court of the United States

CHARLES IRVIN LITTLETON, JR.

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this Americans with Disabilities Act ("ADA") suit by a man with mental retardation, respondent employer agreed, as an accommodation, to permit a disabilities job coach to be present during the job interviews, but reneged and required the job coach to leave the room. The applicant was then turned down because of poor interpersonal skills.

Petitioner was rejected solely on account of the very issue on which the courts of appeals are in conflict.

1. On an issue as to which the courts of appeals are in conflict and disarray, is "interaction with others" or "social interaction" a "major life activity" under the ADA?

2. Did the court of appeals, in violation of *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), set an insurmountable standard for an ADA plaintiff on whether an impairment substantially limits a major life activity for summary judgment purposes, and thus impermissibly deny a jury trial on the issue?

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OPINIONS BELOW

The May 11, 2007 opinion of the United States Court of Appeals for the Eleventh Circuit, No. 05-12770, is unpublished, and appears at 2007 WL 1379986. It is reproduced at 1a.

The April 12, 2005 memorandum opinion of the United States Court of Appeals for the Northern District of Alabama, 04-00066-CV-AR-S, is not published. It is reproduced at 10a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Relevant provisions of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq. (1994 ed. and Supp. V)* are 42 U.S.C. §§12102 (Definitions), 12132. (Discrimination), and 12112(a) and (b) (Employment Discrimination). These are at Appendix C at 19a.

STATEMENT

A. Introduction

The district court's jurisdiction was invoked under 28 U.S.C. §1331, 1343(3) and (4), and the Americans with Disabilities Act. Amended Complaint (Mar. 2, 2004).

Under the Americans with Disabilities Act (ADA), an employer must provide reasonable accommodations to a job applicant during the application process.[1] Here, an agreed accommodation was not provided. The issue which the accommodation was intended to address was later given as the sole reason Petitioner Littleton was not hired. This is the issue on which the circuit courts are split.

The impact of the ADA on the Nation's commerce, consumers and people with disabilities is immense. People are now productive in our economy who would in the past have been excluded. Census 2000 counted 49.7 million non-institutionalized people with a long lasting condition or disability, including 33.2 million aged 16 to 64, of whom 6.8 million have a mental disability. Also, 21.3 million people in the 16 to 64 age group were found to have a condition that affected their ability to work at a job or business. 6.7 million in that age group have a mental disability.[2]

People with mental retardation comprise a substantial part of our Nation's population. There are 4.56 million people with mental retardation and developmental disabilities (MR/DD) in the United

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[1] *E.g.*, 42 U.S.C. §§12112(a) (no discrimination in application procedures or hiring); 12112(b)(3)(A) (standards, criteria or methods of administration which have discriminatory effect); (b)(5)(A) (not making reasonable accommodations for applicant); (b)(6) (qualification standards).

[2] U.S. Census Bureau, Waldrop, J. & Stern, S. *Disability Status: 2000, Census 2000 Brief* (March 2003). The report does not break out mental retardation.

States.[3] Total federal, state and local spending for MR/DD services in FY 2002 was $34.6 billion.[4]

A serious inter-circuit conflict is preventing consistent guidance on the ADA issue in this litigation.

This case involves the first, and often the most important, steps in a person's employment efforts: the application and initial interviews. Petitioner Littleton was promised an essential but simple accommodation for initial job interviews. The employer, which knew he was disabled, broke the promise. He was rejected solely on account of the very issue on which the courts of appeals are in conflict.[5]

Two questions of national significance are presented on this appeal. First, with the courts of appeals in disarray and conflict, is "interaction with others" or "interpersonal" skills a "major life function" under the ADA? The court below stated that the answer is "unclear" but decided against Mr. Littleton based on an assumption on this point.

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[3] D. Braddock. R. Hemp. and M.C. Rizzolo, *State of the States in Developmental Disabilities: 2004*, 42 Mental Retardation 356 (2004).

[4] *Id.*

[5] The summary judgment record consists of depositions and several declarations submitted by Respondent Wal-Mart Stores, Inc., and a declaration and a letter submitted by Petitioner Littleton with his response. The Statement here is based on opinions below which are cited as "A-__," and the record below, cited as the specific item, such as "Littleton Dep. __."

The Second, Seventh, Eighth and Ninth Circuits have held or described interacting with others as a major life activity under the ADA. The First Circuit rejects that notion. The Fourth Circuit doubts that it is a major life activity. The Sixth and Tenth have declined to address or avoided the issue. The federal district courts have been without uniform guidance for years. In addition, those courts which superficially agree have come to divergent interpretations.

The second question is whether, in violation of *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), the court of appeals set an insurmountable standard for an ADA plaintiff on when an impairment substantially limits a major life activity for summary judgment purposes, and thus impermissibly denied a jury trial on the issue.

Unless corrected, the result is the denial of a jury trial to Mr. Littleton and others subjected to the same legal error.

This petition's focus on the interview accommodation highlights that it does not involve any question on what accommodations Mr. Littleton might need on the job, or whether he is able to perform it. Mr. Littleton, like others in his position, needs to get his foot in the door for a fair interview. Review here would provide the opportunity to address this question in an unambiguous context.

B. The job application and interviews

Petitioner Charles Irvin Littleton, Jr., is a 29-year old man who was diagnosed with mental retardation as a young child. Littleton receives social security

benefits because of his disability and lives at home with his mother. He graduated from high school in 1994 with a certificate in special education. Littleton has been a lifelong client of various state agencies and public service organizations. 4a.[6]

It is undisputed that Petitioner Littleton suffers from mental retardation. 4a, 9a, . At the time this dispute arose, Wal-Mart knew that he was disabled. 11a-12a.[7]

Respondent Wal-Mart store in Leeds, Alabama was very familiar with Charles Littleton. Before his job application, he had met with its Personnel Manager Marlene Barcanic (he called her, "Miss Marlene") four times and telephoned her weekly for several months.[8] Petitioner Littleton had a job coach, vocational counselor Carolyn Agee, who worked for the Birmingham Independent Living Center "where her job was to find employment for individuals with disabilities." 11a.

The job coach accompanied Petitioner Littleton to the Wal-Mart store in March 2003, where he applied through Ms. Barcanic for the job of "cart pusher." 4a, 11a.[9]

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[6] Darbara Littleton Decl., Ex. B to Plaintiff's Response to Defendant's Motion for Summary Judgment; Darbara Littleton Dep. 30.

[7] Agee Dep. 15, 17-20; Darbara Littleton Decl., Ex. B to Plaintiff's Response to Defendant's Motion for Summary Judgment.

[8] ¶7, Darbara Littleton Decl, Ex. B, supra.

[9] Littleton Dep. 38.

At that time, Mr. Littleton's job coach met with Ms. Barcanic and discussed his disability with her. 11a-12a. Barcanic knew Littleton had a disability, Agree testified. 12a.[10] Ms. Barcanic agreed that Wal-mart would provide the accommodation of having the job coach present at the formal employment interviews, specifically "to make sure that Littleton understood all the questions asked." 12a. *See* 4a.

> Q. Did you discuss with Ms. Marlene [Barcanic] any need for an accommodation by Mr. Littleton during the interview process itself?
>
> A. I did. I told her I would like to be present because he might not be able to understand some things asked.
>
> Q. And she –
>
> A. She said it was fine. She agreed.[11]

Further, Ms. Barcanic committed to the job coach she would "make sure I [the Job Coach] was present" for any interview.[12]

On March 7, 2003 Petitioner Littleton returned and was interviewed at the store. His job coach Ms. Agee came with him, but "Agee was not allowed to accompany Littleton in the interview." 4a, 12a. Ms.

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[10] Agee Dep. 15, 17-20.

[11] Agee Dep. 17, 23-24 (quotation from 23).

[12] Agee Dep. 17.

Barcanic made the job coach leave the room, leaving Mr. Littleton alone for the interviews.[13]

Thus, Mr. Littleton was in the room, with Ms. Agee present to support him, and then, as he put it, Personnel Manager "Miss Marlene asked Ms. Agee to leave."[14] Petitioner Littleton's first interview was with the store's customer service manager and then he was interviewed by the assistant manager.

In summary judgment materials, the interviewers later stated that, based the interviews alone, "they believed Mr. Littleton had poor interpersonal skills" and therefore he was not hired. 13a.[15]

Directly pointing to the "social interaction" question presented in this petition, the district court put it this way: "They did not indicate any judgment based on a perceived 'disability,' unless poor interpersonal skills constitutes a disability." 13a.

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[13] Littleton Dep. 40-41; Agee Dep. 23-24 ("She [Barcanic] didn't allow me to be present."). Ms. Barcanic later claimed in her summary judgment declaration she was "not aware" of any specific mental impairment of Petitioner Littleton's. Barcanic Decl., ¶4.

In any event, Ms. Barcanic does not dispute in her declaration or otherwise that Ms. Barcanic agreed to the accommodation to have the job coach present for he interview, or that Ms. Barcanic personally later excluded the job coach from the interviews, contrary to the agreement.

[14] Littleton Dep. 41.

[15] *See* Harkey Dep. 45-46; Johnson Decl. ¶3 "poor interpersonal skills."

Petitioner Littleton never heard from Wal-Mart again. 13a. He was "upset, very upset" at not getting the job.[16] He told his mother that the store "didn't want to hire him because they felt that he had a disability."[17]

C. Petitioner Littleton's social interaction deficits

Petitioner Littleton has difficulty communicating and relating to people due to his disability. He was compared to that of an eight year child old by the job coach.[18] She testified that for people with mental retardation, "sometimes they communicate in different ways."[19]

A symptom of how Mr. Littleton's impairment manifests itself in his particular case is that he is very uncomfortable and intimidated by unfamiliar circumstances involving strangers and formal questioning. The uncontradicted declaration of his mother explained:

> One dominant symptom of Charles' disability is that he is very uncomfortable and intimidated by unfamiliar circumstances. His inability to cope with formal questions from strangers – such as job interviews and depositions – is directly connected to his disability. * * * The symptom which Wal-

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[16] Agee Dep. 57.

[17] Darbara Littleton Dep. 27.

[18] Agee Dep. 29.

[19] Agee Dep. 29.

> Mart characterizes as "'poor interpersonal skills" was exacerbated by Wal-mart in two ways on the day of the job interviews. First, Wal-Mart isolated Charles from his job counselor Carolyn Agee, who accompanied him intending to be present in the interviews. Second, Wal-Mart isolated him from "Miss Marlene [Barcanic]", who was the person at Wal-Mart with whom Charles was familiar.[20]

Littleton's deposition also demonstrates his confusion in encountering others and their questioning. The court of appeals observed, "We acknowledge that a review of Littleton's deposition testimony is not inconsistent with his assertion that he sometimes has difficulty thinking or communicating." 8a.

It is significant that, on summary judgment, Wal-Mart did not defend its failure to provide the agreed accommodation in the interview process.[21]

D. Decisions Below

On April 12, 2003, the United States District Court for the Northern District of Alabama granted summary judgment in favor of Wal-Mart on the basis that Littleton could not establish a *prima facie*

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[20] ¶8, Darbara Littleton Decl., Ex. B to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Mar. 31, 2005).

[21] Personnel Manager Barcanic provided a written declaration which does not deny the promised interview accommodation. Barcanic Decl. at ¶4.

case under the ADA. The court determined that Littleton was not substantially limited in any major life activity and thus did not meet the definition of disabled as defined by the ADA. (The court also incorrectly stated that Mr. Littleton had offered "no evidence" of any substantial limitation on a major life activity.). Once the district court reached this determination, it went no further in its analysis.

The district court referenced the social interaction issue this way: "They [Wal-Mart's interviewers] did not indicate any judgment based on a perceived 'disability,' unless poor interpersonal skills constitutes a disability." 13a. However, the court did not reference Petitioner Littleton's uncontradicted evidence on this point,[22] incorrectly stating that that he offered "no evidence" to show that his impairment substantially limited any life function. 14a.

In its May 11, 2007 decision, the United States Court of Appeals for the Eleventh Circuit noted that Petitioner had raised in his appeal "Wal-Mart personnel manager Marlene Barcanic's awareness of Littleton's limitations and need for assistance during the interview process" and the "poor interpersonal skills" issue, as a "social interaction" matter under the ADA. 3a, 5a.

The court of appeals concluded: "It is unclear whether thinking, communicating and *social interaction* are 'major life activities' under the ADA." 8a (emphasis added).

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[22] See, for example, the discussion in the Darbara Littleton Declaration quoted above at 9.

Although the Court of Appeals agreed that Petitioner Littleton has "certain limitations because of his mental retardation," it found that he did not prove he is substantially limited as to major life activities under the ADA. 9a. The court did not reference Petitioner's uncontradicted evidence to the contrary. The court went on to hold that, "[a]ssuming communicating and social interaction are 'major life activities' under the ADA, we conclude that Littleton has failed to create a genuine issue of material fact that he is substantially limited in those pursuits." 9a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are in conflict and disarray over whether "interaction with others" is a "major life activity" under the Americans with Disabilities Act.

A. Employment of individuals with retardation is a major national issue.

The Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq. (1994 ed. and Supp. V)*, capped national efforts to effectuate civil rights protection for Americans with Disabilities.[23] Congress intended the act to change

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[23] Previous legislation included the Architectural Barriers Act of 1968, 42 U.S.C. § 4151 et seq., Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. § 701 *et seq.*, the Education of the Handicapped Act in 1970, 84 Stat. 175, amended in the Education for All Handicapped Children Act of 1975, 89 Stat. 773, reenacted in 1990 as the Individuals with Disabilities

behaviors affecting a vulnerable minority, akin to legislation to overturn racial discrimination. President Bush referred to the ADA as an "historic new civil rights Act."[24] Senator Tom Harkin, a key sponsor, described it as the "20th century Emancipation Proclamation for all persons with disabilities."[25] Senator Robert Dole called it "the most comprehensive civil rights legislation our Nation has ever seen."[26]

The ADA is intended to benefit both the individual and our Nation. "The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999).

Education Act, 20 U.S.C. § 1400 et seq., the 1975 Developmental Disabilities Assistance and Bill of Rights Act, 89 Stat. 486, 42 U.S.C. § 6001 et seq., the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee et seq., the Air Carrier Access Act of 1986, 49 U.S.C. § 41705, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 et seq.; and the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.

[24] Burgdorf, Jr., R.L., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV.C.R.-C.L.L.REV. 413* (1991) (quoting President Bush at the signing ceremony).

[25] 136 Cong.Rec. S9688 (daily ed. July 13, 1990).

[26] 136 Cong.Rec. S9695 (daily ed. July 13, 1990).

This petition comes against the national backdrop of thirty years of tremendous expansion of supported employment for people with mental retardation and related severe disabilities. People are now productive in our economy who would in the past have been excluded. Census 2000 counted 49.7 million non-institutionalized people with a long lasting condition or disability, including 33.2 million aged 16 to 64, of whom 6.8 million have a mental disability. Also, 21.3 million people in the 16 to 64 age group were found to have a condition that affected their ability to work at a job or business. 6.7 million in that age group have a mental disability.[27]

People with mental retardation comprise a substantial part of our Nation's population. There are 4.56 million people with mental retardation and developmental disabilities (MR/DD) in the United States.[28] Total federal, state and local spending for MR/DD services in FY 2002 was $34.6 billion.[29]

With the assistance of job coaches, such as that afforded to Petitioner Littleton,[30] doors to

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[27] U.S. Census Bureau, Waldrop, J. & Stern, S. *Disability Status: 2000, Census 2000 Brief* (March 2003). The report does not break out mental retardation.

[28] D. Braddock, D., Hemp, R., and Rizzolo, M.C., *State of the States in Developmental Disabilities: 2004*, 42 Mental Retardation 356 (2004).

[29] *Id.*

[30] *E.E.O.C. v. Dollar General Corp.*, 252 F.Supp.2d 277 (M.D. N.C. 2003) (job coach as temporary accommodation under ADA for person with moderate retardation). See Parent, et al., *The*

employment have opened through what is called "supported employment." Supported employment is paid, competitive work for people who have severe disabilities and a demonstrated inability to gain and maintain traditional employment.

Earnings in supported employment are estimated to be nearly $600 million annually, with over $100 million paid by such disabled workers in federal state and local taxes; individuals with disabilities in supported employment increased their annual earnings 490%.[31] People with disabilities in supported employment rose from about 10,000 persons in FY 1986 to 139,812 in FY 1995. The number of supported employment provider agencies grew steadily from an initial count of 324 for FY 1986 to 3,690 in FY 1995.[32]

B. Mental retardation is an impairment which limits social interaction.

Role of Job Coach: Orchestrating Community and Workplace Supports (American Rehabilitation, Autumn, 1994).

[31] American Association on Intellectual and Developmental Disabilities, Fact Sheet: Supported Employment (2007), http: //www.aamr.org/ Policies/faq_supported _employ.shtml. See Rusch, F. R., Keller, K. F., Ganguly, R., & Braddock, D., *Underestimating our nation's investment in segregation: Integrated versus segregated employment*, 29 Research and Practice for Persons with Severe Disabilities *237 (2004)*.

[32] Wehman, P., Revell, G. & Kregel, J., *Supported Employment: A decade of rapid growth and impact*. 2 American Rehabilitation 31, 34 and 38 (Spring 1998).

Mental retardation, the Court has recognized, is an impairment which requires education to improve self-care and self-sufficiency.[33] People with mental retardation, by the nature of the impairment, have difficulty interacting with others, thinking and communicating. Mental retardation obviously limits many such major life activities, the Court has repeatedly observed.[34]

This petition merits review in light of the national importance of the questions presented, the schism

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[33] *Heller v. Doe by Doe*, 509 U.S. 312, 325 (1993) ("the mentally retarded are provided "habilitation," which consists of education and training aimed at improving self-care and self-sufficiency skills.").

[34] *Atkins v. Virginia*, 536 U.S. 304, 318 (2002):

> Because of their impairments, however, by definition they [people with retardation] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

The Court earlier explained that mental retardation is not defined by IQ alone but also by deficits in adaptive behavior.

> "Deficits in adaptive behavior" are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group.

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 443, n. 9 (1985). See *Olmstead v. L.C.*, 527 U.S. 581, 601 (1999) (in ADA context, "everyday life activities of individuals, includes] family relations, social contacts,...").

among the circuit courts, the misreading below of both the ADA and the record.

C. "Major life activities" under the ADA.

Mr. Littleton, like others in his position, needs to fairly get his foot in the door for a fair interview. This petition is focused on the interview accommodation question. It does not involve any question on what accommodations Mr. Littleton might need on the job, or whether he is able to perform all job functions with or without accommodations.

A successful ADA plaintiff must proceed in three steps. He or she must prove (1) that he has a physical or mental impairment, (2) that this impairment implicates at least one major life activity, and (3) that the limitation is substantial. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194-95 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).[35]

The ADA does not define the term "major life activities." This Court, however has explained that "'[m]ajor' in the phrase 'major life activities' means important" and these are activities "that the average person in the general population can perform with little or no difficulty," *Williams*, 534 U.S. at 197. An impairment's impact on a major life activity must be "permanent or long-term." *Williams*, 534 U.S. at 198.

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[35] 42 U.S.C. § 12112(a) (prohibition on discrimination); 42 U.S.C. § 12102(2) (disability definition.

An activity may lack a "public" or "economic" dimension and still be considered important. *Bragdon*, 524 U.S. at 638.[36]

Once the major life activity is identified, there must be a an "individualized" "case-by-case" analysis of whether the limitation on a major life activity is "substantial." *Williams*, 534 U.S. at 198; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

While the circuit courts have addressed with comparatively little difficulty questions regarding whether various physical ailments impact "a major life activity," non-physical ailments – especially those which involve social relations and interaction – have resulted in substantial conflict and confusion among the circuits.

D. Resolving the circuits' conflict is of national importance.

For people with mental retardation, the inter-circuit conflict means no authoritative guidance and spotty protection nationally. For the national employer community, which seeks compliance with the ADA and freedom from needless litigation, resolution of the conflict is also important. Different standards across the circuits create serious problems for those engaged in commerce, and for their hiring practices.

An actual or perceived deficit in social interaction

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[36] "Major life activities" includes such basic abilities as walking, seeing, and hearing. *Williams*, 534 U.S. at 197. The term is further defined at 29 C.F.R. § 1630.2(i).

may, of course, impact on a decision to hire or other decisions in the workplace, regardless of the employee's or applicant's ability to do the job.

Petitioner Littleton's social interaction deficits were one of the grounds for the judgment below.[37] Millions of individuals and workplaces are potentially affected by the question presented in this petition.

E. Whether "major life activity" under the ADA includes social interaction has caused division and a schism among the circuits.

The courts of appeals continue to be in conflict on whether "social interaction" (also termed, "interaction with others" or "interpersonal relations") is a major life activity under the ADA. In addition, those courts which superficially agree have adopted widely divergent interpretations.

Seven years ago, the Court denied certiorari in a case raising this question.[38] Since then, the question has percolated below, with the circuits now in conflict and confusion, or repeatedly avoiding the conflict-ridden question.

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[37] Even if he was not limited in any of the other major life activities cited by the court below, he would be entitled to proceed past summary judgment (on a proper legal standard to be set by this Court) if "social interaction" was a major life activity under the ADA.

[38] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir.1999), *amended by* 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000).

The Second, Seventh, Eighth and Ninth Circuits have held or described interacting with others as a major life activity under the ADA. The First Circuit rejects the notion that it is a major life activit. The Fourth Circuit doubts that it is a major life activity. The Sixth and Tenth have declined to address or avoided the issue. Except in this case, the Eleventh Circuit has not discussed the issue. The federal district courts are in similar disarray over this issue, and have been without uniform guidance for years now.[39]

In a stark example of the confusion, in 2005 two District of Columbia district courts issued decisions reaching opposite conclusions, one agreeing with the

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[39] *E.g., Bennett v. Unisys Corp.*, 2000. WL 33126583 (E.D. Pa. 2000) (it is a major life activity where an "individual's relations are characterized on a regular basis by severe problems such as high levels of hostility, social withdrawal, or failure to communicate when necessary."); *Logan v. Nicholson*, 2006 WL 1492243 (S.D. Tx., May 30, 2006) ("socializing" is not a major life activity; acknowledges conflict among circuits; adopts variation of Second Circuit standard); *Mickens v. Polk County School Bd.*, 430 F Supp 2d 1265, 1276 (M D Fla. 2006) ("Some doubt exists whether working and otherwise interacting with others qualify as "major life activities.'"); *Zale v. Sikorsky Aircraft Corp.*, 2000 WL 306943 (D. Conn. 2000) (agrees with Ninth Circuit); *Peter v. Lincoln Technical Institute, Inc.*, 255 F.Supp.2d 417 (E.D.Pa.,2002) (interaction with others is a major life activity); *McKay v. Town and Country Cadillac, Inc.*, 2002 WL 1285065 (N.D.Ill.,2002) (tilts toward Ninth Circuit approach but characterizes it as involving "family and social relations"); *Herschaft v. New York Bd. of Elections*, 2001 WL 940923, n. 7 (E.D.N.Y.,2001) ("There is a split of authority on the question.").

First Circuit and one agreeing with the contrary Second and Ninth Circuit cases.[40]

The inter-circuit conflict may be illustrated as follows:

A. Finding that social interaction is not a major life activity under the ADA:

FIRST CIRCUIT: *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir.1997) ("the ability to get along with others" is never a major life activity under the ADA, observing that such an ability comes and goes, "triggered by vicissitudes of life which are normally stressful for ordinary people," and that "[t]o impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.").

B. Finding or assuming that interacting with others is an ADA major life activity:

SECOND CIRCUIT: *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004) (interacting with others is a major life activity).

SEVENTH CIRCUIT: *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511 (7th Cir.2001) ("interacting with others" is one of many "activities

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[40] *Battle v. Mineta*, 387 F.Supp.2d 4, 9 (D.D.C. 2005) ("The D.C. Circuit has yet to decide" the issue; agrees with First Circuit; social interaction is "too undefined, indistinct."); *Bell v. Gonzales*, 398 F.Supp.2d 78 (D.D.C. 2005) (agrees with Second and Ninth Circuits).

that feed into the major life activities of learning and working").

EIGHTH CIRCUIT: *Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir.2003) (citing *McAlindin*, below, 9th Circuit decision); *Moysis v. DTG Datanet*, 278 F.3d 819, 825 (8th Cir.2002) (approves Seventh Circuit's treatment of interacting with others and concentrating as activities that "feed into the major life activities of learning and working")

NINTH CIRCUIT: *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir.1999), *amended by* 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000) (interacting with others is "an essential, regular function, like walking and breathing" that "easily falls within the definition of 'major life activity'"); *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005) (interacting with others is a major life activity).

C. Avoiding decision on the issue or assuming without deciding:

SIXTH CIRCUIT: *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 337 (6th Cir.2002) ("it has been held that 'interacting with others,' is a major life activity" but declining to decide the issue).

TENTH CIRCUIT: *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117 (10th Cir. 2003) (notes circuit split); *Kourianos v. Smith's Food & Drug Centers, Inc.*, 65 Fed.Appx. 238 (10th Cir. 2003) (characterizing the issue as "emotional stability," notes "split among the circuits on the issue" of interaction with others); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1254-55 (10th Cir.2001) (declining to

address issue; notes circuit split); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 10th Cir. 2000) (assumes interacting with others is major life activity)

D. Doubting that interacting with others is a major life activity:

FOURTH CIRCUIT: *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 (4th Cir.2004) ("decline to resolve" this issue, while noting the conflicting views among the circuits); *Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n. 4 (4th Cir.2001) (doubts that interacting with others is major life activity).

F. The circuits' conflicting views of the nature of 'interaction with others"

An applicant for a job who has disabilities may, like Mr. Littleton, have more than the usual nervousness or discomfort during an interview. For someone with mental retardation, limited cognitive and social abilities, and difficulty with questioning, may make it reasonable, if not necessary, that someone like a job coach be present to facilitate the process.

Interaction with others covers a gamut of activity in the workplace, from the cantankerous or obnoxious worker to the withdrawn, isolated or non-communicative applicant or worker. One may have social interaction limitations in one's private life which may not directly affect an initial interview or work (*cf. Bragdon*'s major life activity of reproduction qualifying him under the ADA). One's social interaction limitations might be of a common or a very unusual nature. One's difficulty may be

with one person, such as a supervisor, but not with others. Any such behavior may, or may not be, the result of a disability. Social interaction limitations are unlike the diagnosis of major physical ailments in at least some ways and similar in others.

In addition to emphasizing the split among the circuits, opinions typically note the polar opposite views of the First Circuit and the Ninth Circuit. The Second Circuit in *Jacques* took a middle ground between the Ninth in *McAlindin* and the First Circuit in *Soileu*. Even courts appearing to agree have widely differing interpretations of the issue.

The First Circuit rejects the notion that interacting with others is a major life activity, suggesting that it is unworkable and unlike other major activities like breathing or walking:

> The concept of "ability to get along with others" is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations..

Soileau, 105 F.3d at 15.

The Ninth Circuit cited this Court's *Bragdon* decision and found that "interacting with others is no more vague than 'caring for oneself,' which has been widely recognized as a major life activity." *McAlindin v. County of San Diego*, 192 F.3d 1226,

1235 (9th Cir.1999), *amended by* 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000).[41] Interacting with others "easily falls within the definition." *McAlindin*, 192 F.2d at 1234.

The Second Circuit in *Jacques*, taking a different approach, linked interaction with others to limitations on the ability to communicate, departing from both the First Circuit and the Ninth Circuit:

> We hold that a plaintiff is "substantially limited" in "interacting with others" when the mental or physical impairment severely limits the fundamental ability to communicate with others. This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people - at the most basic level of these activities.

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[41] *McAlindin* noted that there are limits to its holding: "... does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation." 192 F.3d at 1235.

Similarly, another Ninth Circuit decision refined the "interaction with others" rubric; the plaintiff must show that "relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005) (internal quotes omitted).

Jacques v. DiMarzio, Inc., 386 F.3d 192, 203 (2d Cir. 2004).

Only this Court can resolve the divergent and conflict-ridden appeals court (and district court) rulings and provide definitive guidance for the Nation's employees and employers.[42]

II. In violation of *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), the court of appeals set an insurmountable standard for an ADA plaintiff on whether an impairment substantially limits a major life activity for summary judgment purposes, and thus impermissibly denied a jury trial on the issue.

This Court's stringent test in *Williams* for "substantially limited" is not insurmountable. One "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." The impact must be "permanent or long term." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

The Eleventh Circuit Court of Appeals here effectively tightened the already-stringent test

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[42] This petition does not address other major life activities considered below (thinking, reading, learning) because, as to them, there is no major divergence among the courts below. If certiorari is granted, petitioner may argue, and the Court may find, that these questions overlap with the social interaction question, as some courts of appeals have held.

beyond reason or practicality. It held that, even if thinking, learning, communication and social interaction are **all** major life activities, Petitioner Littleton fails the test. He is a man with significant mental retardation which, by its nature affects **all** these activities and who specifically is so hampered in communication and social interaction that he needs (as Wal-Mart agreed) a job coach for an interview.

There is no doubt that Mr. Littleton had serious deficits with regard to interpersonal or social interaction, including especially answering questions in a formal setting. The evidence on this is uncontradicted.

Even if one adds some of Mr. Littleton's abilities to the mix, the "substantially limited" question is a fact question for the jury. It is not a question which the court of appeals, stretching *Williams* beyond recognition, should decide on summary judgment.

Summary judgment for a defendant is appropriate when the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); Fed.R.Civ.P. 56(c).

Once the major life activity is identified, there must be a an "individualized" "case-by-case" analysis of whether the limitation on a major life activity is "substantial." *Williams*, 534 U.S. at 198; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

This "case by case" approach is inherently factual.

The ADA determination of whether an impairment "substantially limits" a major life activity is a jury question. *E.g., Doebele, Sprint/United Management Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003) ("ascertaining whether the ADA impairment substantially limits the major life activity is a factual question for the jury."). As the court put it in *Bristol v. Bd. of County Com'rs of County of Clear Creek*, 281 F.3d 1148, 1158 (10th Cir. 2002), *vacated in part on other grds on rehearing en banc*, 312 F.3d 1213 (10th Cir. 2002): "Determining [whether] the plaintiff has proven he is 'unable to perform' or is 'significantly restricted' in performing a major life activity involves weighing evidence and assessing credibility of witnesses, tasks historically given to the jury in our judicial system."[43]

Either there is no conflict in the facts (the evidence of substantial limitation on interaction with others is uncontradicted), or there is an implicit factual dispute. In either case, summary judgment cannot properly be granted to the employer.[44]

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[43] Other circuits and the district courts also understand that the "substantially limited" issue is a jury question. *See Lebron-Torres v. Whitehall Labs.*, 251 F.3d 236, 241 (1st Cir.2001); *Weber v. Strippit*, Inc., 186 F.3d 907, 913 (8th Cir.1999); *Hall v. Wal-Mart Assocs., Inc.*, 373 F. Supp. 2d 1267, 1271 (M.D. Ala. 2005); *E.E.O.C. v. Dollar General Corp.*, 252 F. Supp. 2d 277 (M.D.N.C. 2003); *Walsted v. Woodbury County, IA*, 113 F. Supp. 2d 1318 (N.D. Iowa 2000); *E.E.O.C. v. Luby's Inc.*, 2005 WL 3560616 (D. Ariz. 2005).

[44] The summary judgment material on this point includes Petitioner's deposition, his mother's declaration, the Alabama state certification of his disability, the job coach's testimony,

The court of appeals denied Petitioner Littleton any opportunity to have the jury evaluate the substantiality of the effect of his disability on his major life functions and, in doing so, failed to follow this Court's teaching in *Williams*.

CONCLUSION

For the above reasons, it is respectfully submitted that a writ of certiorari should be granted on both questions.

On the second question presented, in view of the clear error, the Court may wish to consider summary reversal.

Respectfully submitted,

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and Wal-Mart's own employees' descriptions of his poor interpersonal relations. One need not have medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity at the summary judgment stage. Even a plaintiff's testimony alone may suffice to establish a genuine issue of material fact. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir.1999); *Fraser v. Goodale*, 342 F.3d 1032, 1041 (9th Cir. 2003) (employee's diary).

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Eleventh Circuit (May 11, 2007) 2a

B. Opinion of the U.S. District Court for the Northern District of Alabama (April 12, 2005) 10a

C. Americans with Disabilities Act of 1990. 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq. (1994 ed. and Supp. V).* 19a

Note: Page numbers of the slip opinions are indicated by "*__." Neither opinion is published.

APPENDIX A

COURT OF APPEALS OPINION

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3.

United States Court of Appeals, Eleventh Circuit.

Charles Irvin LITTLETON, JR., Plaintiff-Appellant,
v.
WAL-MART STORES, INC., Defendant-Appellee.
No. 05-12770.

May 11, 2007.

Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 04-00066-CV-AR-S.

Before BIRCH and BLACK, Circuit Judges, and MILLS,[FN*] District Judge.

FN* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

*1 Charles Irvin Littleton, Jr. appeals the district court's order granting Wal-Mart Store, Inc. summary judgment on his failure-to-hire disability

discrimination claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112, 12132. Littleton claims that the district court erred in finding that he was not disabled under the ADA because his permanent condition of mental retardation limits one or more of his major life activities, namely (1) learning, (2) thinking, (3) communicating, (4) social interaction, and (5) working. We assume the parties' familiarity with the facts and procedural history of this case.

I. BACKGROUND

On appeal, Littleton claims that there is at least a genuine issue of material fact tending to show that his mental retardation substantially limited him as to certain major life activities. Regarding the major life activities of learning, thinking, communicating and social interaction, Littleton contends that the district court failed to consider the following evidence in the light most favorable to him: (1) testimony from his job coach and mother concerning his limited ability to think and communicate; (2) Wal-Mart personnel manager Marlene Barcanic's awareness of Littleton's limitations and need for assistance during the interview process; (3) observations of Wal-Mart interviewers that Littleton displayed poor interpersonal skills and a lack of enthusiasm about the job; and (4) his deposition testimony, which showed that he had limited cognitive abilities and difficulty navigating the interview process. Based on these factors, Littleton argues that a reasonable jury could infer that he is disabled under the ADA.

Charles Irvin Littleton, Jr. is a 29-year old man who was diagnosed with mental retardation as a young child. Littleton receives social security benefits because of his disability and lives at home with his mother. He graduated from high school in 1994 with a certificate in special education. Throughout his working life, Littleton has been a client of various state agencies and public service organizations. He was referred to Carolyn Agee, an employment coordinator with the Alabama Independent Living Center. They attempted to secure employment for Littleton as a cart-push associate with a Wal-Mart Store in Leeds, Alabama. Littleton claims that Barcanic, the personnel manager at that store, initially said that Agee could accompany him in the interview. Upon arrival at the store, however, Agee was not allowed to accompany Littleton in the interview. The interview did not go well and Littleton was not offered a position.

II. DISCUSSION

"We review de novo a district court's ruling on summary judgment, applying the same legal standards as the district court." *Matthews v. Crosby*, 480 F.3d 1265, 1268 (11th Cir.2007) (citation omitted). The Court views the evidence in the light most favorable to the nonmoving party. *Id.* at 1269. Summary judgment is appropriate if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

*2 To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show (1) that he has a disability; (2) he is a qualified

individual; and (3) he was discriminated against because of his disability. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir.2004). If Littleton establishes a prima facie case, a presumption of discrimination arises and the burden shifts to Wal-Mart to proffer a legitimate, non-discriminatory reason for the employment action. *Id.* If Wal-Mart meets its burden, then Littleton must show that the proffered reason is a pretext for discrimination. *Id.*

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). To prove that he is disabled due to an impairment, a plaintiff must prove that the impairment, as personally suffered by him, substantially limits a major life activity. *See Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1132 (11th Cir.1996) (citing 29 C.F.R. § 1630.2(j) (App.)). Under the "regarded as" prong of section 12102(2)(c), an individual is "disabled" if his employer perceives him as having an ADA-qualifying disability. *See Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213, 1216 (11th Cir .2004).

Littleton asserts that: (1) he is substantially limited in the major life activities of learning, thinking, communicating, social interaction and working; and (2) Wal-Mart perceived him as being substantially limited in working, communicating, and social interaction. Courts look to the ADA's implementing

regulations to determine the functions that qualify as "major life activities." We are mindful that the Supreme Court has stated that the term "disability" is to be "interpreted strictly to create a demanding standard for qualifying as disabled." *See Carruthers,* 357 F.3d at 1216 (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U .S. 184, 197 (2002)). The regulations provide that mental retardation qualifies as a "mental impairment." *See* 29 C.F.R. § 1630.2(h)(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See* 29 C .F.R. § 1630.2(i). This court has not determined whether thinking, communicating and social interaction constitute "major life activities" under the ADA.

In his appellate brief Littleton asserts that the district court did not consider evidence pertaining to limitations on his ability to think and communicate. After reviewing the record, however, we conclude that Littleton failed to argue before the district court that there were any limitations on his ability to think and communicate, nor did he contend he was substantially limited as to any other alleged major life activity. This is true even though Wal-Mart asserted that it was entitled to summary judgment because Littleton could not establish a prima facie case under the ADA, in that he was unable to show he was substantially limited in any major life activity. Because Littleton produced no evidence on this point, the district court properly concluded that "Wal-Mart is entitled to judgment as a matter of law here because there is no evidence to support

Littleton's necessary contention that his retardation substantially limits him in one or more major life activities." *See, e.g., Williams,* 534 U.S. at 195 ("Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.").

*3 We generally do not consider issues that were not raised before the district court. *See Narey v. Dean,* 32 F.3d 1521, 1526-27 (11th Cir.1994). Even if the issue was properly raised, we conclude that Wal-Mart is still entitled to summary judgment because Littleton has failed to produce any evidence that his mental impairment substantially limited any major life activities.

As for the major life activity of working, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *See* 29 C.F.R. § 1630.2(j)(3)(i). Littleton, his mother and Agee all testified that there are no jobs he cannot perform because of any alleged disability. Accordingly, Littleton has not shown that he is substantially limited in this major life activity.

"Learning" is also a major life activity, *see* 29 C.F.R. § 1630.2(i), so we must determine whether there is a genuine issue of material fact regarding whether Littleton's ability to learn is substantially limited by his mental retardation. Wal-Mart acknowledges that

Littleton's mental retardation is a permanent condition, which is a factor that courts consider in determining whether an individual is substantially limited in a major life activity. *See* 29 C.F.R. § 1630.2(j)(2)(ii)-(iii). After graduating from high school with a certificate in special education, Littleton attended a technical college and majored in mechanical maintenance. The record shows that Littleton is able to read and comprehend and is able to perform various types of jobs. It is apparent that Littleton is somewhat limited in his ability to learn because of his mental retardation. However, he has pointed to no evidence which would create a genuine issue of material fact regarding whether he was substantially limited in the major life activity of learning because of his mental retardation.

It is unclear whether thinking, communicating and social interaction are "major life activities" under the ADA. We acknowledge that a review of Littleton's deposition testimony is not inconsistent with his assertion that he sometimes has difficulty thinking or communicating. Even if thinking and communicating are major life activities, however, Littleton has not shown that he is substantially limited in those activities. As Wal-Mart contends, moreover, the fact that Littleton drives a car might be determined to be inconsistent with his assertion that his abilities to think and learn are substantially limited. Additionally, Littleton's mother and Agee testified that Littleton is capable of being interviewed for a job without any accommodation, is "very verbal," and would not need a job coach to communicate effectively with other people in the

workforce. This bolsters Wal-Mart's contention that any difficulty Littleton has with communicating does not appear to be a substantial limitation.

*4 We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as "disabled" under the ADA, however, Littleton has the burden of proving that he actually is, is perceived to be, or has a record of being substantially limited as to "major life activities" under the ADA. 42 U.S.C. §§ 12102(2)(A), 12112(a), 12132; *see also Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1227 (11th Cir.1997). Assuming that thinking, communicating and social interaction are "major life activities" under the ADA, we conclude that Littleton has failed to create a genuine issue of material fact that he is substantially limited in those pursuits. Thus he has failed to assert a prima facie case of discrimination under the ADA.

We AFFIRM the district court's entry of summary judgment in favor of Wal-Mart.

C.A.11 (Ala.),2007.
Littleton v. Wal-Mart Stores, Inc.
Slip Copy, 2007 WL 1379986 (C.A.11 (Ala.)), 19 A.D. Cases 440

APPENDIX B

DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
04-AR-0066-S

CHARLES IRVIN LITTLETON, JR.,
Plaintiff,
v.

WAL-MART STORES, INC.,
Defendant.

MEMORANDUM OPINION

Before the court is the motion for summary judgment of defendant, Wal-Mart Stores, Inc. ("Wal-Mart"). Plaintiff, Charles Littleton ("Littleton"), is suing Wal-Mart for violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, alleging that Wal-Mart refused to hire him on account of his disability. For the reasons that follow, Wal-Mart's motion is due to be granted.

Summary Judgment Facts[45]

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[45] Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact

Littleton suffers from mental retardation and high blood pressure. He is certified by the State of Alabama to receive services through the Department of Rehabilitation Services. A

*2 vocational counselor named Carolyn Agee ("Agee") assisted Littleton in his efforts to obtain employment during the time period relevant to this lawsuit. Agee worked for a grant-based organization called Birmingham Independent Living Center (the "Center"), where her job was to find employment for individuals with disabilities.

Agee accompanied Littleton to the Wal-Mart store in Leeds, Alabama, in March 2003. At that time, Littleton completed an application for employment. Agee spoke with Marlene Barcanic ("Barcanic"), the store's personnel manager, about the prospect of employing Littleton as a cart pusher, and even discussed Littleton's disability with her in very general terms.[46] Agee indicated in her deposition

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and that it is entitled to judgment as a matter of law. Rule 56(c), F.R.Civ.P.; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In assessing whether the movant has met its burden, the court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in his favor. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). In accordance with this standard, the following statement of facts includes both undisputed facts and the facts according to the plaintiff's evidence, where there is a dispute.

[46] Agee maintains that she did not go into detail with any Wal-Mart personnel about the specifics of Littleton's disability, because to do so would have violated Littleton's confidence.

that she introduced herself as a vocational specialist with the Center and that Barcanic knew Littleton had a disability.

Agee expressed to Barcanic that Littleton might need an accommodation during his interview, namely, having Agee present in order to make sure that Littleton understood all the questions asked. Barcanic agreed to this request. In her deposition, Agee also opined that Littleton might need "a little more coaching" than an average individual in any particular job due to his disability, particularly during the first few days of a new job.

On March 7, 2003, Littleton was interviewed at the Leeds

*3 store. Agee accompanied Littleton that day, but she was not given the opportunity to sit in on Littleton's interviews. Littleton first interviewed with the store customer service manager, Sandra Johnson ("Johnson"). She noted on her comment sheet that, in response to a question about the type of people he enjoyed working with, Littleton responded that he did not like being around people. In his deposition, Littleton denied making such a statement. After completing her interview, Johnson showed her comments to assistant manager, Paige Harkey ("Harkey"), who was to interview Littleton next. Johnson voiced concerns to Harkey about Littleton as a prospective employee. Harkey reviewed Johnson's notes and proceeded to interview Littleton. Both Johnson and Harkey testify that, based on the interviews, they believed Littleton had poor interpersonal skills. They did not indicate any judgment based on a perceived "disability," unless

poor interpersonal skills constitutes a disability. After her interview, Harkey told Littleton that she would speak with her co-manager and that he would receive a phone call if another interview was needed. Littleton was never contacted or offered a position.

Littleton testified in his deposition that his only disability is high blood pressure. His mother attempted to explain this apparent discrepancy between Littleton's testimony and his allegations by saying that her son is uncomfortable acknowledging his mental retardation. Littleton, to the contrary, testified that

*4 he is not limited whatsoever in terms of what he can do. Def. Exh. A, Littleton Depo. pp. 19-22. Both his mother and Agee testified that he can communicate effectively with others and that there is no entry level job he cannot do because of his disability. Def. Exh. C., D. Littleton Depo. pp. 31-34; Def. Exh. D., Agee Depo. pp. 34-35, 42.

Analysis

Wal-Mart's motion is due to be granted because Littleton's evidence fails to establish that he is "disabled" within the meaning of that term as used in the ADA. To establish a *prima facie* case, Littleton must demonstrate that he is (1) disabled, (2) a qualified individual, and (3) that he was subjected to unlawful discrimination because of his disability. 42 U.S.C. § 12112(a); *Rossbach v. City of Miami*, 371 F.3d 1354, 1356-57 (11th Cir. 2004). Viewing the record in the light most favorable to Littleton, there is simply no substantial evidence to support the critical element of his claim that he be "disabled."

This is not to discount the evidence that Littleton suffers from some degree of mental retardation. Having what is considered a disability in the abstract, however, does not establish that an individual is "disabled" as that term is used in the ADA. Wal-Mart is entitled to judgment as a matter of law here because there is no evidence to support Littleton's necessary contention that his retardation substantially limits him in one or more major life activities.

*5 *See Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195 (2002)("[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity").

When the ADA makes it unlawful to discriminate against a prospective employee because he is disabled, it defines "disability" as:

> (A) a physical or mental impairment that substantially
>
> limits one or more of the major life activities of
>
> such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Although Littleton is mentally impaired and there is evidence that Wal-Mart, through Barcanic's involvement, recognized Littleton's limitations, these

observations do not make Littleton's impairment into an ADA disability. To establish an ADA case, Littleton must show that his impairment "severely restricts [him] from doing activities that are of central importance to most people's daily lives." *Williams* at 196-97. As the Supreme Court pointed out in *Williams:*

> The impairment's impact must also be permanent or long term. It is insufficient for individuals attempting to prove disability status...to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires...'evidence that the extent of the limitation...in terms of [the plaintiff's] own experience...is substantial.' (internal citation omitted). That the Act defines 'disability" with respect to an individual'...makes clear that Congress intended the existence of a disability to be determined

*6

> in such a case-by-case manner.
>
> ******
>
> An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.

Id. at 198-99.

The Supreme Court's discussion in *Williams* illuminates the reason Littleton's claim fails: he presents no evidence that his retardation

substantially limits one or more of his major life activities. Littleton, Agee, and Littleton's mother all swear that he is able to perform all types of jobs. He is able to read, to comprehend, and to communicate. The overwhelming evidence is that he is not limited in any major life activity. In fact, Littleton does not even identify any major life activity that he claims he is substantially limited in performing. In other words, the first element for framing the debate – identification of the substantially limited major life activity – is here lacking. Without even referring to the test set forth by the Supreme Court, Littleton's brief simply argues by way of legal conclusion that "Littleton is [d]isabled," apparently based mainly on the fact that he "is certified by the State to receive services from the Alabama Department of Rehabilitation Services." A state agency cannot certify that an individual is "disabled" under the ADA, especially when that individual denies that he has any mental shortcoming that would substantially limit him or

*7 require accommodation by an employer.

The language of the ADA is to be "interpreted strictly to create a demanding standard for qualifying as disabled." *Williams*, 534 U.S. at 197. Even drawing all reasonable inferences in Littleton's favor, given the total lack of evidence that he is substantially limited in any particular major life activity, Littleton cannot satisfy the first element of his *prima facie* case that he either is, has a record of, or was regarded as disabled as that term is defined

by the ADA.[47]*See Hilburn Murata Electronics North America, Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999)("a party...faced with a properly supported summary judgment motion, is obligated to come forward with extrinsic evidence which is 'sufficient to establish the existence of an element essential to that party's case'" (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986))). Thus, Littleton's claim fails as a matter of law, and Wal-Mart's motion is due to be granted.

Wal-Mart has also filed a motion to strike Littleton's

*8 submission of evidence in opposition to its motion for summary judgment. Because summary judgment is proper with or without consideration of the challenged evidentiary submissions, the court will deem moot defendant's motion to strike.

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[47] Littleton, like the plaintiff in *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000), "did not clearly articulate which of the three statutory definitions of disability [he] was proceeding under." Even assuming, however, that Littleton contends he is disabled under all three definitional prongs, the requirement that the disability – whether actual, record, or perceived – substantially limit a major life activity applies with full force under each prong. *See id.* at 1306 (framing the issue as "whether [plaintiff] presented evidence that [defendant] 'regarded' her as having an impairment that substantially limited a major life activity under § 12102(2)(C)"). The court does not adopt Wal-Mart's contention that Littleton can only proceed upon showing that he actually has a substantially limiting impairment, but it does not have to in order to conclude that his ADA claim fails.

DONE this 12th day of April, 2005.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

AMERICANS WITH DISABILITIES ACT

Relevant provisions of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq. (1994 ed. and Supp. V).*

42 U.S.C. 12102 (Definitions)

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12132 (Discrimination)

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. 12112(a) and (b)
(Employment Discrimination)

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

* * *

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; * * *